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No. 94-1029

In The

Supreme Court of the United States

October Term, 1994

THE STATE OF OKLAHOMA,

Petitioner,

vs.

PONCA TRIBE OF OKLAHOMA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

In its Petition for Writ of Certiorari, the State of Oklahoma sets its questions presented for review against an Indian Gaming Regulatory Act which it claims compels, coerces and dictates the States to enter into gaming compacts with the Indian Tribes. (Pet. for Cert., p. i). However, the Indian Gaming Regulatory Act which the State of Oklahoma claims to exist is not the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* ("IGRA"), enacted by Congress and which is the law today.

IGRA provides the States the opportunity to negotiate and to enter into gaming compacts with the Indian Tribes and to thereby participate in the process of determining the procedures by which Tribal gaming activities will be conducted. However, the States are not forced to do so. IGRA provides no penalties or sanctions that can be levied against the States should they decline to enter into gaming compacts or even should they refuse to negotiate with the Tribes. In light of the actual IGRA enacted and in force today, the questions presented for review are more accurately stated to be:

I.

Whether Congress, in regulating Indian gaming under the Indian Commerce Clause, is empowered to abrogate the States' Eleventh Amendment immunity?

II.

Whether Congress, in granting the States the opportunity to negotiate and enter into gaming compacts with the Indian Tribes, unconstitutionally interfered with any powers reserved to the States under the Tenth Amendment?

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The questions presented for review in this case arise out of Congress' enactment of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* ("IGRA"). A presumption of constitutionality attaches to every Act of Congress. *Walters v. National Association of Radiation Survivors,* 468 U.S. 1323, 1324 (1984); *Marshall v. Barlow's Inc.,* 429 U.S. 1347, 1348 (1977). Facial challenges to the constitutionality of an Act of Congress are the most difficult challenges to mount successfully,

since the challenger must establish that no set of circumstances exist under which the Act would be valid. *United States v. Salerno*, 481 U.S. 739, 745 (1987). In this case, Petitioner State of Oklahoma claims that the provisions of IGRA granting the States the opportunity to negotiate and to enter into gaming compacts with the Indian Tribes violate both the Eleventh Amendment and Tenth Amendment to the United States Constitution.

A. The Indian Gaming Regulatory Act's Intent to Grant the States the Opportunity to Participate in the Process of Determining the Procedures by Which Certain Tribal Gaming Activities Will Be Conducted

In 1987, this Court held that a State could not enforce its "civil/regulatory" gaming laws in a manner that would prohibit gaming on Indian lands within its borders. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). The *Cabazon* decision left Indian gaming largely unregulated by the States; similarly, "existing federal law d[id] not provide clear standards or regulations for the conduct of gaming on Indian lands." 25 U.S.C. § 2701(3). In an attempt to insure adequate regulation and after contentious debate concerning the appropriate State role in the regulation of Indian gaming, Congress enacted IGRA. The primary purpose of IGRA is "to provide a statutory basis for the operation of gaming by Indian Tribes as a means of promoting Tribal economic development, self-sufficiency, and strong Tribal governments." 25 U.S.C. § 2702(1). In order to accomplish this goal, Congress defined classes of Indian gaming, 25 U.S.C. § 2703(6)-(8); established the National Indian Gaming Commission to monitor and regulate some forms of Indian gaming, 25 U.S.C. §§ 2704-2708; and provided a compacting procedure by which States might participate in the process of determining the regulations for certain forms of Indian gaming, 25 U.S.C. § 2710(d).

Briefly summarized, Congress divided Indian gaming into

three "classes." Class I gaming, which is governed and regulated solely by individual Indian Tribes, consists mainly of "social games solely for prizes of minimal value . . ." 25 U.S.C. § 2703(6). Class II gaming, which is subject to certain federal regulations, includes bingo and comparable games as well as non-banking card games where not prohibited by State law. 25 U.S.C. § 2703(7). Neither of these classes is relevant to the questions the State of Oklahoma seeks to have this Court review.

The questions presented for review arise from the third class of gaming. Class III gaming is defined residually; it includes "all forms of gaming that are not Class I gaming or Class II gaming." 25 U.S.C. § 2703(8). Specifically excluded from Class II, and therefore within the scope of Class III, are banking card games and "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." 25 U.S.C. § 2703(7)(B). Class III gaming is the type of gaming most profitable to the Indian Tribes; it is also the gaming over which the States want the greatest control.

In order to achieve a compromise between the interests of the States and the interests of the Indian Tribes, Congress mandated that Class III gaming activities would be lawful on Indian lands only when these activities are authorized by the Tribe; located in a State that permits such gaming for any purpose by any person or organization; and conducted in conformance with a Tribal-State compact. 25 U.S.C. § 2710(d)(1).[1] To ensure that dilatory actions

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1. However, Congress' provision in IGRA for a Tribal-State compact did not constitute a mandate that the State regulate Tribal Class III gaming. As stated by Senator Evans:

> . . . [A] compact should be a negotiation between two sovereigns. It is entirely conceivable that a particular State will have no interest in operating any part of the

(Cont'd)

by the State could not preclude or unreasonably delay Indian gaming, IGRA delineated a negotiating process designed to culminate in the Tribal-State compact and provided mechanisms to remedy State misconduct.

B. The Tribal-State Compacting Mechanism and Its Use of the Federal Courts

Under IGRA, the Tribe initiates the compacting process by requesting that the State enter into negotiations for the purpose of concluding a Tribal-State compact governing the conduct of gaming activities. In IGRA, Congress directed that the State "shall negotiate with the Indian Tribe in good faith to enter into a compact." 25 U.S.C. § 2710(d)(3)(A). If these negotiations bear fruit, the compact must be approved by the Secretary of the Interior and published in the Federal Register. 25 U.S.C. § 2710(d)(8).

Congress also anticipated that Tribal-State negotiations would not always produce a mutually satisfactory compact. Congress therefore provided the Tribes with a remedy in the federal courts:

> (7)(A) The United States district courts shall have jurisdiction over —

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> regulatory system needed for a Class III Indian gaming activity, and there will be no jurisdictional transfer recommended by the particular tribe and state. Each compact will need to consider, among other items, the experience and expertise of the particular tribe and State with gaming, and the existence of regulatory mechanisms within each government. Congress should expect a reasoned and rational approach to these compacts and not simply a demand that tribes come under a State [regulatory] system.

134 Cong. Rec. S12651 (daily ed. Sept. 15, 1988) (statement of Sen. Evans).

> (i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact . . . or to conduct such negotiations in good faith . . .
>
> * * *
>
> (B) (i) An Indian tribe may initiate a cause of action described in subparagraph (A) (i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3) (A).

25 U.S.C. § 2710(d)(7)(A)(i) and (B)(i). If the district court finds that the State has failed to negotiate in good faith, that court "shall order the State and the Indian Tribe to conclude such a compact within a 60-day period." 25 U.S.C. § 2710(d)(7)(B)(iii). If that fails, "the Indian tribe and the State shall each submit to a mediator appointed by the Court a proposed compact that represents their last best offer for a compact." 25 U.S.C. § 2710(d)(7)(B)(iv). The mediator then selects the better of the two proposals and submits it to the Indian Tribe and the State. The State then either may consent to the compact within sixty days, in which case the compact is treated as if it were the product of negotiations; or may refuse to consent, in which case the Secretary of the Interior in consultation with the Tribe prescribes procedures by which to regulate the Tribe's Class III gaming. 25 U.S.C. § 2710(d)(7)(B)(vi) and (vii).

IGRA thus provides the State with a choice — to negotiate in good faith with the Indian Tribe for a compact to govern the Tribe's Class III gaming activities or to not negotiate and allow the Secretary of the Interior and the Tribe to promulgate

procedures governing the Tribe's gaming. Should the State elect not to negotiate, IGRA does not authorize the federal government to impose a penalty on the State nor does it authorize an award of damages to the Tribe. Thus rather than being coerced or compelled to compact with the Tribe, IGRA provides the State with an opportunity that under *Cabazon* and pre-IGRA it did not have, to enter into negotiations with the Tribe and to participate in the process of determining the procedures by which Tribal gaming activities will be conducted.

REASONS FOR DENYING THE WRIT

In its decision, the Court of Appeals for the Tenth Circuit reversed the District Court for the Western District of Oklahoma, holding that in enacting IGRA, Congress was empowered under the Indian Commerce Clause to abrogate the States' Eleventh Amendment immunity and that IGRA's provisions directing the States to negotiate for gaming compacts with the Indian Tribes did not violate the Tenth Amendment powers reserved to the States (Pet. for Cert., pp. 1a-40a). The Court's review of the Tenth Circuit's decision is not warranted because:

1. There is no split among the circuits on the issue of IGRA violating the Tenth Amendment.

2. The request for review is predicated on an Indian Gaming Regulatory Act which compels, coerces and dictates that the States enter into gaming compacts with the Indian Tribes; however, IGRA is wholly lacking in the penalties or sanctions which would compel or coerce the States to enter into gaming compacts with the Tribes.

I.

THERE IS NO SPLIT AMONG THE CIRCUITS ON THE ISSUE OF IGRA VIOLATING THE TENTH AMENDMENT.

The State of Oklahoma asserts that its Petition for Writ of Certiorari should be granted because the decision by the Tenth Circuit conflicts with the decision of the Eleventh Circuit in *Seminole Tribes of Florida v. Florida,* 11 F.3d 1016 (11th Cir. 1994) (Pet. for Cert., pp. 11-14). As to the issue of whether Congress was empowered under the Indian Commerce Clause to abrogate the States' Eleventh Amendment immunity, the *Seminole Tribes* decision differs from that of the Tenth Circuit. However, the Eleventh Circuit expressly declined to rule on the issue of IGRA violating the Tenth Amendment. *Seminole Tribes* at p. 1019, fn. 2. Furthermore, none of the other circuit courts of appeals decisions cited by the State of Oklahoma conflicts with the Tenth Circuit's decision that IGRA does not violate the Tenth Amendent.[2] Accordingly, review by the Court of the Tenth Circuit's decision that IGRA does not violate the Tenth Amendment is not necessary to resolve a conflict among the circuit courts of appeals.

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2. Circuit decisions cited by the State of Oklahoma include *Spokane Tribe of Indians v. Washington State,* 28 F.3d 991 (9th Cir. 1994) (held only that Congress expressed an intent and possessed the power to abrogate the State's Eleventh Amendment immunity when it enacted IGRA); *Cheyenne River Sioux Tribe v. South Dakota,* 3 F.3d 273 (8th Cir. 1993) (held that the Tribe's action under IGRA was not barred by Eleventh Amendment immunity and that IGRA did not violate the Tenth Amendment); and *Ysleta del sur Pueblo v. Texas,* 26 F.3d 1325 (5th Cir. 1994) (dismissing the Tribe's suit on other grounds).

II.

THE REQUEST FOR REVIEW IS PREDICATED ON AN INDIAN GAMING REGULATORY ACT WHICH COMPELS, COERCES AND DICTATES THE STATES ENTER INTO GAMING COMPACTS WITH THE INDIAN TRIBES; HOWEVER, IGRA IS TOTALLY LACKING IN THE PENALTIES OR SANCTIONS WHICH WOULD COMPEL OR COERCE THE STATES TO ENTER INTO GAMING COMPACTS WITH THE TRIBES.

Congress' complete or plenary authority to regulate Indian affairs, and the States' total lack of such authority, was established by the Indian Commerce Clause of the United States Constitution, which provides:

> *Section 8.* The Congress shall have Power ... To regulate Commerce ... with the Indian Tribes.

U.S. Const. art. I, § 8, cl. 3.

In *United States v. 43 Gallons of Whiskey,* 93 U.S. 188 (1876), the Court broadly construed Congress' plenary authority, stating "As long as these Indians remain a distinct people, with an existing tribal organization, recognized by the political department of the government, Congress has the power to say with whom, and on what terms, they shall deal . . ." *Id.* at p. 195. Subsequently, in *Dick v. United States,* 208 U.S. 340 (1908), the Court stated, "Congress now has the exclusive and absolute power to regulate commerce with the Indian tribes — a power as broad and free from restrictions as that to regulate commerce with foreign nations." *Id.* at p. 356. And more recently in *County of Oneida, New York v. Oneida Indian Nation of New York,* 470 U.S.

226 (1985), the Court stated, "With the adoption of the Constitution, Indian relations became the exclusive province of federal law." *Id.* at p. 234. The States' lack of authority over the Indian Tribes in regards to gaming was recognized in *California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987), wherein the Court held the States could not enforce their "civil/ regulatory" gaming laws on Indian lands within their borders. Thus, prior to 1988, only Congress had the power to regulate Tribal gaming; conversely, the States had no power or right to participate or be involved in gaming activities by the Indian Tribes on Indian lands.

Following *Cabazon,* a large outcry arose from the States over the decision. In response thereto, but only after contentious debate concerning the appropriate State role in Indian gaming, Congress enacted IGRA in 1988. IGRA divided Indian gaming into three classes. Only with Class III gaming, which included banking card games and electronic or electromechanical facsimiles of any game of chance or slot machines, were the States given any opportunity to be involved or participate in Indian gaming.

The parameters of the States' opportunity to participate in Class III gaming were set forth in 25 U.S.C. § 2710(d). Therein, IGRA provided that an Indian Tribe could engage in Class III gaming activities only if such activities were "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State." 25 U.S.C. § 2710(d)(1)(C). However, in establishing the requirement for a Tribal-State compact, Congress did not intend to give the States veto power over Tribal Class III gaming activities. Accordingly, Congress created an elaborate compacting mechanism intended to give the States the opportunity to participate in the process by which Class III gaming activities would be conducted, but would not allow the States to preclude the Tribes from engaging in Class III gaming.

The mechanism for creating a Tribal-State compact begins by the Tribe requesting the State to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. 25 U.S.C. § 2710(d)(3)(A). Should the Tribe and the State successfully negotiate a compact, the compact becomes effective upon its approval by the Secretary of the Interior and notice of the approval is published in the Federal Register. 25 U.S.C. § 2710(d)(3)(B). The Secretary of the Interior may disapprove a compact only if the compact violates:

1. IGRA;

2. any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands; or

3. the trust obligations of the United States to the Tribe.

25 U.S.C. § 2710(d)(8)(B).

Should the Tribe and the State fail to conclude and enter into a compact within 180 days after the Tribe requests the State to enter into negotiations, the Tribe may initiate a cause of action against the State. 25 U.S.C. § 2710(d)(7)(B)(i). Jurisdiction for such actions is vested in the United States district courts. 25 U.S.C. § 2710(d)(7)(A)(i).

Should the district court find that the State has negotiated in good faith with the Tribe, the action is dismissed. Only should the district court find that the State has not negotiated in good faith does IGRA provide for further proceedings in the action. In such event, the district court is to order the Tribe and the State to conclude a compact within 60 days. 25 U.S.C. § 2710(d)(7)(B)(iii).

IGRA recognizes that despite the district court order, the

Tribe and the State may still be unable to conclude a compact. Should the compact not be concluded within the 60-day period, the district court is authorized to appoint a mediator and the Tribe and the State are to each submit to the mediator a proposed compact that represents their last best offer for a compact. The mediator shall then determine and select the compact which best comports with IGRA, other applicable federal law and with any findings and order of the district court. 25 U.S.C. § 2710(d)(7)(B)(v).[3] Upon making its determination, the mediator shall submit the selected compact to the Tribe and the State. 25 U.S.C. § 2710(d)(7)(B)(v).

If within 60 days of receiving the submitted compact the State consents to the compact, the compact shall become effective upon approval by the Secretary of the Interior and publication of the approval. 25 U.S.C. § 2710(d)(7)(B)(vi). If the State does not consent within the 60-day period, the mediator shall so notify the Secretary of the Interior. Following receipt of the notice, the Secretary, in consultation with the Tribe, shall prescribe procedures — consistent with the compact selected by the mediator, IGRA and the relevant provisions of the State's law — under which the Tribe may conduct Class III gaming. 25 U.S.C. § 2710(d)(7)(B)(vii).[4]

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3. As with a refusal by the State to conclude a compact with the Tribe within 60 days as prescribed by the district court order, IGRA provides for no penalty or sanction should the State refuse to submit a proposed compact to the mediator. In such event, the mediator shall presumably select the Tribe's compact as being the compact which best comports with IGRA and the other criteria.

4. The State of Oklahoma asserts that should the Secretary of the Interior prescribe procedures for the conduct of a Tribe's gaming, the State will be "subject to the Secretary of the Interior's dictation of [its] regulatory role in regulating Indian gaming." (Pet. for Cert., p. 20). However, there is no requirement in IGRA that the State regulate Tribal gaming activities; thus, any

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The State of Oklahoma claims the IGRA compacting mechanism compels and coerces the State to negotiate and enter into compacts with the Tribes and to regulate Tribal gaming activities. In reliance thereon, the State further claims that such compulsion and coercion provides the basis for finding IGRA violates both the Eleventh Amendment and the Tenth Amendment (Pet. for Cert., pp. i and 14-22). However, other than making these claims, the State is unable to point to any provision in IGRA which compels or coerces it to do anything or which provides that the State is to regulate the Tribe's Class III gaming activities.

Review of IGRA regarding Class III gaming and the Tribal-State compacting mechanism reveals that the only requirement in IGRA is that the Tribe request the State to enter into negotiations for a compact. After that one requirement, the State can elect to negotiate in good faith or decline to negotiate for a compact. Should the State negotiate in good faith, it will have the opportunity to participate in the process of determining the procedures by which Tribal Class III gaming activities will be conducted. Should the State decline to negotiate, procedures for the conduct of Class III gaming by the Tribe will be prescribed by the Secretary of the Interior. And by virtue of its plenary powers over Indian affairs, there is no question that Congress can delegate to the Secretary of the Interior the power to promulgate procedures for the conduct of gaming by the Tribes.

(Cont'd)
concern that the Secretary may direct the State to do so is premature. Second, in the absence of such a requirement in IGRA, the Secretary of the Interior is not empowered to direct the State to regulate Tribal gaming activities nor to grant to the State the civil/regulatory jurisdiction that would be required. Should the Secretary of the Interior do so, the Secretary would be in violation of the principles set forth in *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973), and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), wherein the Court recognized that the grant of jurisdiction to the State over Indian lands must be clearly consented to by the express language of Congress.

Rather than coercing or compelling the States, IGRA provides the State with a choice — to negotiate in good faith with the Indian Tribe for a compact to govern the Tribe's Class III gaming activities or to decline to negotiate and allow the Secretary of the Interior to prescribe procedures governing the Tribe's gaming. Should the State decline to negotiate, IGRA does not authorize the courts or the federal government to sanction or impose a penalty on the State nor does it authorize an award of damages to the Tribe. Thus instead of being coerced or compelled, IGRA provides the State with an opportunity it did not have prior to the enactment of IGRA — to enter into negotiations with the Tribe and to participate in the process of determining the procedures by which Tribal Class III gaming will be conducted.

Absent the compulsion or coercion the State claims exists in IGRA, there is no foundation to the constitutional challenges the State of Oklahoma has made to IGRA and no meritorious reason for the Court to grant the State's Petition for Writ of Certiorari.

CONCLUSION

The State of Oklahoma has failed to provide a reason for this Court to review the questions it has presented. As to its claim that IGRA violates the Tenth Amendment, the State is unable to show any conflict among the circuit courts of appeals with the Tenth Circuit's decision that IGRA does not violate the Tenth Amendment. In regards to the State's claim that IGRA compels and coerces it to compact with the Indian Tribes and to regulate Tribal gaming, the State has not and is unable to cite any provision in IGRA which compels or coerces the State to take any action. The State's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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